IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09/04/2002

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

C.R.P.No.2890 of 2001

S.Muthalibu .. Petitioner

-Vs-

A.Govindaswamy Mudaliar .. Respondent

Revision against the order dated 30.4.2001 in C.M.A. No.58 of 1999 on the file of the learned I Additional Judge, City Civil Court, Chennai, in pursuance of the order dated 29.9.1997 in I.A.No.1675 of 1997 in O.S.No.6713 of 1994 on the file of the V Assistant Judge, City Civil Court, Chennai.

!For petitioner : Mr.N.Damodaran

^For respondent : Mr.K.Mahesh

:ORDER

The revision petitioner is the second defendant in O.S.No.6713 of 19 94 on the file of the learned V Assistant Judge, City Civil Court, Chennai, laid for a decree and judgment, directing the revision petitioner/2nd defendant and the first defendant in the suit to pay a sum of Rs.23,000/- with interest thereon at 18% per annum from the date of the plaint till the date of realisation.

2. Even though notice was served on the revision petitioner/second defendant, directing him to appear before the learned V Assistant Judge, City Civil Court, Chennai on 21.10.1994, the matter was adjourned to 24.2.1995, on which date, the revision petitioner was informed that all the cases pending before the learned V Assistant Judge, City Civil Court, Chennai, were transferred to various Courts. Therefore, even before he could verify the `A Diary to appear before the concerned Court, viz., the learned VII Assistant Judge, City Civil Court, Chennai, the case was called and the revision petitioner was set ex parte. Hence, he filed an application to set aside the order dated 24 .2.1995, setting the revision petitioner ex parte; but the same was confirmed by order dated 25.4.1996 in C.R.P.No.671 of 1995.

3. Thereafter, an ex parte decree was passed against the revision

petitioner on 28.8.1996, which was also confirmed by order dated 30.4.2 001 made in C.M.A.No.58 of 1999 on the file of the learned I Additional Judge, City Civil Court, Chennai, on the ground that the order, setting the revision petitioner/2nd defendant ex parte on 24.2.1995 had already been confirmed by an order dated 25.4.1996. But, admittedly, the ex parte decree made against the first defendant under Order IX Rule 13 on 28.8.1996 was set aside by order dated 29.9.1997 in I.A. No.1675 of 1997. Hence, the above revision.

4. Mr.S.V.Jayaraman, learned senior counsel appearing for the revision petitioner/2nd defendant, placing reliance on the first proviso to Order IX Rule 13(1), C.P.C., contends that merely setting the revision petitioner/2nd defendant ex parte by order dated 24.2.1995, made under Order IX Rule 7, by itself, will not be a res judicata for setting aside the ex parte decree passed against the revision petitioner on 28.8.1996, particularly

in view of the first proviso to Order IX Rule 13(1). In this regard, Mr.S.V.Jayaraman, learned senior counsel, places reliance on the decision of the Apex Court in ARJUN SINGH VS. MOHINDRA KUMAR reported in AIR 1964 SC 993.

5. Per contra, Mr.K.Mahesh, learned counsel appearing for the respondent, contends that in view of the order dated 25.4.1996 made in C.R.P.No.671 of 1995, refusing to interfere with the order dated 24.2.199 5, setting the revision petitioner ex parte, the revision petitioner is not entitled to seek to set aside the ex parte decree dated 28.8.1 996, as held by order dated 29.9.1997 in I.A.No.1675 of 1997, by the learned V Assistant Judge, City Civil Court, Chennai, and confirmed by order dated 30.4.2001 made in C.M.A.No.58 of 1999 on the file of the learned I Additional Judge, City Civil Court, Chennai.

6. I have given careful consideration to the submissions of both sides.

7. In this regard, I am obliged to refer Order IX Rule 7 and Order IX Rule 13(1), C.P.C., which read as follows:
Order IX Rule 7:
 Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.-- Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Order IX Rule 13(1):
 Setting aside decree ex parte against defendant.-- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and

shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:(emphasis supplied)

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff□s claim.

Explanation-- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

(2) The provisions of Section 5 of the Indian Limitation Act, 19 08, shall apply to applications under sub-rule (1). □ (emphasis supplied)

8. The Apex Court, in ARJUN SINGH VS. MOHINDRA KUMAR reported in AIR 1964 SC 993, while interpreting Section 11, Order IX Rule 7 and Order IX Rule 13, C.P.C., has held as follows:
□ Scope of the principle of res judicata is not confined to what is contained in S.11 but is of more general application. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competency to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in later proceedings. Where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable.

Interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of, the court would be justified in rejecting the same as an abuse of the process of court. There are other orders which are also

interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sence that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O.IX, R.7 Civil P.C. would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate Court. In that sense, the refusal of the court to permit the defendant to set the clock back does not attain finality. But though the same court is not finally bound by that order at later stages, so as to preclude its being reconsidered, and even if the rule of res judicata does not apply it would not follow that on every subsequent day on which the suit stands adjourned for further hearing, the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of res judicata. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, nay would be bound to take those into account and make an order conformably to the facts freshly brought before the court.

9. Therefore, it is well settled, as held in Arjun Singh case, referred supra that in its essence order under O.9 R.7 is directed to ensure the orderly conduct of the proceedings by penalising improper dilatoriness calculated merely to prolong the litigation. It does not put an end to the litigation nor does it involve the determination of any issue in controversy in the suit. Besides, it is obvious that the proceeding is of a very summary nature and this is evident from the fact that as contrasted with O.IX Rule 9 or O.IX R.16, no appeal is provided against action of the Court under O.IX, R.7, refusing to set back the clock. It is, therefore, manifest that the Code proceeds upon the view not imparting any finality to the determination of any issues of fact on which courts action under that provision is based, and thus, a decision or direction in an interlocutory proceeding of the type provided for by O.IX, R.7 is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under O.IX R.13. The latter is a specific statutory remedy provided by the Code for the setting aside of ex parte decrees, and it is not

without significance that under O.43 R.1(d) an appeal lies not against orders setting aside a decree passed ex parte but against orders rejecting such an application, unmistakeably pointing to the policy of the Code being that subject to securing due diligence on the part of the parties to the suit, the Code as far as possible makes provision for decisions in suits after a hearing afforded to the parties.

10. That apart, in the instant case, admittedly, the ex parte decree made against the first defendant on 28.8.1996 had been set aside by order dated 29.9.1997 in I.A.No.1675 of 1997. If that be so, as per the first proviso to order IX Rule 13(1), the ex parte decree dated 2 8.8.1996 made against the first defendant as well as the revision petitioner/2nd defendant cannot be set aside as against the first defendant alone and it has to be set aside against all or any other defendants also. Therefore, the specific provision, viz., the first proviso to Order IX Rule 13(1) comes to the aid of the revision petitioner to set aside the ex parte decree dated 28.8.1996, and therefore, the ex parte decree dated 28.8.1996 is set aside, and consequently, the learned I Additional Judge, City Civil Court, Chennai, is directed to take up the written statement filed by the revision petitioner/2nd defendant on file, frame the issues, try the suit and dispose of the same on merits within six months from the date of receipt of a copy of this order.

The revision is ordered accordingly. No costs. C.M.P.No.15438 of 20 01 is closed.

Index: Yes
Internet: Yes

ksv

While passing the final order dated 09.04.2002, setting aside the ex-parte decree dated 28.08.1996 in the above Civil Revision Petition, this Court directed the learned First Additional Judge, City Civil Court, Chennai to take up the written statement filed by the revision petitioner / second defendant on file, frame the issues, try the suit and dispose of the same on merits within six months from the date of receipt of a copy of this order, instead of learned Fifth Assistant Judge, City Civil Court, Chennai.
2. Hence, the matter is posted today for being mentioned to rectify the factual mistake crept in the above order.
3. There is no objection on behalf of the respondents.
4. Hence, paragraph 10 of the order dated 09.04.2002 is modified and "learned I Additional Judge, City Civil Court, Chennai" shall be read as "learned Fifth Assistant Judge, City Civil Court, Chennai".

5. Registry is directed to carry out the mistake and issue a fresh order, marking a copy to the Fifth Assistant Judge, City Civil Court, Chennai, within a period of one week from today.

Dpn/- 11.03.2004